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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-963

DRAVO CORPORATION, S. J. GROVES & SONS CORPORATION and GUST K. NEWBERG CONSTRUCTION CO.,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, ATTORNEY GENERAL, DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS and BARNEY J. GRABIEC, DIRECTOR OF THE DEPARTMENT OF LABOR OF THE STATE OF ILLINOIS,

Respondents,

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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KEENAN PRINTING COMPANY

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I.

THE ORDER BELOW IS CLEARLY FINAL WITHIN THE MEANING OF 28 USC § 1257 AS INTERPRETED BY THIS COURT.

Respondent takes the position in its brief that the decision of the Illinois Appellate Court is not final inasmuch as the Appellate Court reversed and remanded the cause to the trial court for trial. The State argues, "Respondents-Plaintiffs might never be able to prove that the disputed land was located within the boundaries of the State of Illinois . . ." The State thus urges upon this Court the argument that this Court should refuse review because the State's position might be held to be wrong in the lower courts. He makes no mention of the consequences if both Illinois and Kentucky courts find in favor of such respective states.

While we are unable intelligently to come to grips with an argument which proceeds from the premise that the State Courts should be permitted to try this case because the State Court might find the State's position erroneous, prior decisions of this Court have made it clear that the principle of finality as expressed in Section 1257 is not meant to deny the jurisdiction of this Court to adjudicate ripe constitutional issues in the circumstances here presented.

This Court has consistently recognized that superficial lack of finality is not a bar to review of questions of constitutional rights where such questions are in fact ripe for review in the posture of the record.

In *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520, this Court held that an

order determining venue had the requisite finality to invoke the jurisdiction of the Supreme Court. Upholding it's jurisdiction, the Court said, in language particularly descriptive of the situation before the Court in the instant case:

> ". . . Moreover, we believe that it serves the policy underlying the requirement of finality in 28 USC § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings . . ." (371 U.S. at 558)

In *Mills* v. *Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434, the Court said:

> "The State has moved to dismiss this appeal on the ground that the Alabama Supreme Court's judgment is not a 'final judgment' and therefore not appealable under § 1257. The State argues that since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered 'final.' This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional conten-

tions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." (384 U.S. at 217)

In *Local No. 438 Construction Laborers* v. *Curry*, 371 U.S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531, this Court, in agreeing to determine whether a temporary injunction had been properly issued, said at 371 U.S. 548:

". . . The federal question raised by petitioner in the Georgia court, and here, is whether the Georgia courts had power to proceed with and determine this controversy. The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction (compare *Gibbons v. Ogden* (US) 6 Wheat 448, 5 L. Ed. 302) nor is it the question of whether federal or state law governs a case properly before the Georgia courts. Compare *Teamsters, C. W. & H.* v. *Lucas Flour Co.*, 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571. What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board."

In the instant case the issue is whether the Illinois Court has jurisdiction to proceed to determine the location of Dog Island in the face of the claim of jurisdiction over this Island by Kentucky. This issue was squarely passed upon by the trial court, which decided it did not have such jurisdiction, and by the Appellate Court, which

decided that the trial court had jurisdiction. A refusal to review this constitutional issue in the framework of the record as presented to this Court in the instant case, which clearly raises the constitutional issue, will subject not only the parties but also the State of Kentucky to a long, complex, expensive, and, perhaps worse, frustrating litigation, because, in view of the principles set forth in the Petition for Certiorari, decisions of the Courts of each State cumulatively determining that the Island lies in Illinois *and* Kentucky simply cannot stand. The legal issue of jurisdiction cannot be changed by trial—under the reasoning of *Mills*, *Langdeau* and *Curry*, *Supra*, it is entirely proper for this Court to review the decision below at this time.

A last point should be noted respecting finality.

In *Western Union* v. *Commonwealth of Pennsylvania*, 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed. 2d 139 (1961), this Court, after noting that there were conflicting claims to the property involved, and that the Pennsylvania Courts had no power to adjudicate the claim of New York, said:

> "When this situation developed the Pennsylvania Courts should have dismissed the case." (368 U.S. 80)

Thus, the holding of this Court in *Western Union* was not simply that it would be a denial of due process for Western Union to be required to pay the same funds to each State, but also that it was a denial of due process of law for the Pennsylvania Court to proceed to adjudicate the liability of *Western Union* where it was unable to also adjudicate the claim of another contending State.

In this light the order appealed from is indeed final, as affecting a deprivation of due process of law because further adjudication by the Illinois Court, in the absence of Kentucky, is itself a violation of due process.

II.

THE RECORD CLEARLY REFLECTS THAT EACH STATE ACTIVELY CLAIMS JURISDICTION OF DOG ISLAND.

The State, in its brief, does not squarely contend that decisions of Illinois and Kentucky Courts finding the Island to be in both states can stand, but rather, the State implies that Kentucky really doesn't claim this Island. The State then criticizes petitioners for bringing to the Court's attention the fact that Kentucky has actually filed suit against petitioners seeking collection of taxes premised on Kentucky's contention that Dog Island is in Kentucky. We submit that it is entirely appropriate for this Court to take judicial notice of this action. (5 Moores Federal Practice 2d Ed. § 43.09; *MacNiel Bros.* v. *Cohen*, 163 F.S. 106.

We are uncertain as to whether Illinois denies that the suit exists or denies its materiality. To establish the fact of its existence, we reprint as an appendix to this brief the complaint on file in the Kentucky Court, together with a letter from the Clerk of said Court, certifying that said case has been filed and is pending.

Turning to the question of materiality, the action by Kentucky in the Kentucky Court confirms the position of Kentucky, as indicated in the letters from Kentucky taxing officials attached to Respondent's motion to dismiss, that Kentucky indeed claims Dog Island and the right to tax activities thereon. It is apparent from the course of the State's argument that the Attorney General is not interested in purity of the record, but rather is disgruntled that his gratuitous assumptions and inferences

of lack of jeopardy from Kentucky can be rebutted. Incredibly, confronted not only with the assertions of jurisdiction from the taxing authorities as set forth in the motion to dismiss and the fact of existence of the suit by Kentucky, the Attorney General coyly asks this Court to indulge the inference that Kentucky is really not interested. On page 10 he states:

> ". . . Petitioner's alleged facts of any enforcement proceedings commenced by Kentucky for the payment of taxes relating to Dog Island should and must be disregarded . . ."

Certainly, they must be disregarded in order to permit the Court to indulge the Attorney General's inference that Kentucky is not interested, and while the Attorney General may be less than candid, he is certainly consistent, stating further on page 13:

> ". . . Kentucky has not actively and aggressively pursued its claim to the property in question."

Again, apparently fearful that this Court may view the fact of filing suit by Kentucky as an indication that Kentucky intends to assert jurisdiction (and we submit there can be no clearer indication), the Attorney General states:

> ". . . Thus the inference previously made by respondents, seems justified that petitioners, under the guise of a pretended and conjectural due process violation, play off one state against the other and thereby avoid the payment of any taxes to either state."

We submit the record is clear that it is not the petitioners which have created the situation involving adverse claims of the two states, but rather, the states themselves, by asserting their claims in forums which cannot make a determination which will bind all parties. Both states

have the requisite standing to file suit in this Court for resolution of the issue of the location of the Island, while petitioners have no standing to sue the states in any forum.

The Attorney General's urging of *Standard Oil Company* v. *State of New Jersey*, 341 U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822, is posited in such a manner that he apparently concedes that if Kentucky is actively pursuing its claim, Western Union should control. No further purpose would be served in this brief in reiterating the distinction between the two cases as set forth in the petition. We do wish to point out to the court, however, that *Worcester County Trust Company* v. *Riley*, 302 U.S. 292, 82 L. Ed. 268, 58 S. Ct. 185, underscores the petitioners' dilemma rather than solves it. In that case it was expressly held that one in the position of petitioners could not maintain an action under the Federal Interpleader Act against the states because of the Eleventh Amendment. This was the entire holding of the Court.

It is, therefore, submitted that this court should issue the Writ of Certiorari as prayed.

Respectfully submitted,

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312-726-0870,

EDWARD M. WHITE,
Of Counsel.

APPENDIX

FRANKLIN CIRCUIT COURT

CIVIL ACTION No. 4398

COMMONWEALTH OF KENTUCKY
EX REL
DIVISION OF UNEMPLOYMENT INSURANCE

PLAINTIFF

v. COMPLAINT

DRAVO CORPORATION
4800 Grand Avenue
Pittsburgh, Pennsylvania

S. J. GROVES & SONS COMPANY
40 Washington Avenue, South
Minneapolis, Minnesota

GUST K. NEWBERG CONSTRUCTION COMPANY
2040 North Ashland Avenue
Chicago, Illinois

DEFENDANTS

The plaintiff, for its cause of action, states that:

1. The defendants (joint venturers) became subject to the Kentucky Unemployment Insurance Law on August 15, 1971 pursuant to KRS 341.070 (6) as joint venturers on a construction project in Kentucky and continued to be subject employers under the Kentucky Unemployment Insurance Law and as such liable for the payment of contributions (taxes) on wages paid to its workers.

2. The defendants (joint venturers) became delinquent in paying all contributions due for the third quarter of 1973 and as a result indebted to the plaintiff in the amount $18,322.89 plus penalty of $181.41 per month beginning December 1, 1973 until paid.

3. Notice of Assessment and Demand for Payment was served on the defendants, but defendants have failed or refused to pay the indebtedness.

4. Failure of the defendants to pay the contributions when due created a statutory lien pursuant to KRS 341.310 in favor of the plaintiff upon all property of the defendants as of the due date, and such lien is on a parity with state, county, municipal ad valorem tax liens and is superior to the lien of any mortgage or other encumbrance created and/or recorded subsequent to the date any liens of the plaintiff were filed in the office of the porper county court clerk.

WHEREFORE, the plaintiff demands judgment against the defendants in the amount of $18,322.89 with penalty thereon of $181.41 per month until paid and further demands that a lien be adjudged for the same amount upon the properties of the defendants.

James G. Childers
Attorney for Plaintiff
Capitol Annex—Room 227
Frankfort, Kentucky 40601
Phone (502) 564-3260

STATE OF KENTUCKY }
COUNTY OF FRANKLIN } SCT:

I, James E. Collins, Clerk of the Franklin Circuit Court, do hereby certify that the foregoing is a true and correct copy of the Complaint wherein Commonwealth of Kentucky ex rel, Division of Unemployment Insurance is Plaintiff and Dravo Corporation, S. J. Groves & Sons Company and Gust K. Newbert Construction Company are Defendants, being Civil Action No. 4398, which appears of record in my office aforesaid.

I further certify that the foregoing action is still pending in the Franklin Circuit Court.

Witness my hand as Clerk of the Franklin Circuit Court, this the 14th day of March, 1974.

JAMES E. COLLINS,
Clerk,
Franklin Circuit Court.

By: PEGGY CALVERT, D.C

[Seal]